Ontario Justice Education Network

TOP FIVE 2015

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

LOYOLA HIGH SCHOOL v QUEBEC (ATTORNEY GENERAL), 2014 SCC 37, [2014] 2 SCR 33.

Date Released: March 19, 2015

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14703/index.do

Facts

Since 2008, Quebec's Ministry of Education, Recreation, and Sports has required that all schools offer a program on Ethics and Religious Culture (ERC), which seeks to teach diversity and respect for others from a neutral and secular (i.e. non-religious) perspective. Loyola High School, a private Montreal Catholic high school for boys, applied for an exemption from this program pursuant to s. 22 of the *Regulation respecting the application of the Act respecting private education*. Section 22 allows the Minister of Education, Recreation, and Sports (the "Minister") to exempt a school where a proposed alternative program can be deemed "equivalent". The Minister denied the request on the basis that the proposed alternative would be taught entirely from the Catholic perspective and therefore was not "equivalent". Loyola brought an application for judicial review of the Minister's decision, arguing that it infringed their constitutional right to religious freedom under s. 2(a) of the *Charter of Rights and Freedoms*. In particular, Loyola argued that it was unreasonable to require that the school teach about Catholic perspectives on ethics from a neutral, non-Catholic perspective.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

Procedural History

The Superior Court quashed the decision of the Minister, upholding Loyola's right to teach the alternative course. This decision was reversed upon appeal to the Court of Appeal of Quebec (QCCA), and the Minister's original decision was reinstated. Loyola appealed the decision to the Supreme Court of Canada (SCC).

Issues

1. Can freedom of religion be extended to organizations and institutions, or does it apply only to individual persons?
2. Does requiring Loyola, a Catholic institution, to teach about Catholicism from a non-Catholic perspective infringe on the school's rights as outlined in s. 2(a) of the *Charter of Rights and Freedoms*?

3. Does the Minister's decision limit Loyola's freedom of religion more than is reasonably necessary in order to achieve the objective of the program?

Decision

The SCC granted Loyola's appeal, finding that mandating a purely secular course violated the school's freedom of religion.

Ratio

Where the objective of a particular statute is to promote tolerance and respect for difference, requiring a religious school to teach a program from a neutral perspective—including the teaching of its own religion— unreasonably limits freedom of religion under s. 2(a) of the *Charter*.

Reasons

The SCC affirmed that Loyola, as a religious organization, is entitled to the constitutional protection of freedom of religion. At issue was whether Loyola's freedom of religion under s. 2(a) had been infringed. The SCC modified the two-part test set out in *Amselem* and *Multani* to apply to an organization rather than an individual.

The modified test is as follows:

(1) Is Loyola's claimed belief that it must teach ethics and its own religion from the Catholic perspective consistent with its organizational purpose and operation?

(2) Does the Minister's decision to deny Loyola an exemption from the ERC Program interfere with Loyola's ability to act in accordance with this belief, in a manner that is more than trivial or insubstantial?

The Superior Court judge had previously found that Loyola's claim was credible. The Attorney General did not challenge this, so the SCC found no reason to deviate from the original finding of credibility with respect to the first point of the new test. On the second point, the SCC again affirmed the Superior Court judge's findings that the Minister's decision interferes with the freedom of religion guaranteed to Loyola.

Finally, the SCC in this case applied the rule in *Doré v. Barreau du Québec* for determining whether this administrative decision proportionately balances the relevant *Charter* guarantees with the objectives of the statute. This is similar to when a court applies the *Oakes* test under s. 1 of the *Charter* to determine whether legislation found to have infringed upon *Charter* rights can still be justified by balancing the interests and conduct of the government against the importance of the violation suffered. Here, the balance under review was between Loyola's s. 2(a) rights and the ERC's aims for "recognition of others" and "pursuit of the common good".

For the SCC, the balance in question tipped in Loyola's favour because the school would have been prevented from teaching or discussing the core of its identity, Catholicism, from its own perspective. The Court found that this interference with s. 2(a) does nothing to further the important goals of the ERC program. The purely secular nature of the ERC Program is not necessarily or explicitly tied to its objective of promoting respect for religious diversity and care between members of different religious groups. So long as the religious perspective of the proposed alternative course does not prevent respectful discussion of other viewpoints or seek to promote one set of religious beliefs as correct, the alternative does not interfere with the objective of the course. In short, there is no reason why this Catholic school should be prevented from teaching about Catholicism from a Catholic perspective. Loyola can do so without compromising the purpose of the ERC.

DISCUSSION

1. What do you think the intended purpose of the ERC course is?

2. In your experience, is there enough done in Canada to promote appreciation for religious and cultural diversity?

3. Should a course like this be required to graduate from high school? Why or why not?

4. Does the SCC's decision to allow Loyola to teach about Catholicism from a Catholic perspective harm the diversity goals of the program?

5. Does being a member of one religious group mean that it will be impossible to discuss other religious traditions neutrally and respectfully?

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R v FEARON, 2014 SCC 77, [2014] SCR 621.

Date Released: December 11, 2014

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14502/index.do

Facts

Kevin Fearon was arrested in connection with the armed robbery of a jewellery vendor. A police officer conducted a pat down search and found a cell phone in Mr. Fearon's pocket. The cell phone was not password-protected or locked. The officer examined the contents of the cell phone and found photographs of a gun and cash as well as an incriminating text message. The cell phone was searched again without a warrant at the police station to determine to whom the text message was sent. The examination showed that it was only a draft that had not been sent to anyone. Months later a warrant was obtained and another search conducted, but this yielded no new evidence.

Canadian Charter of Rights and Freedoms

8. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

24(2). Where […] a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Procedural History

At trial, Mr. Fearon argued that the first two examinations of his phone violated his s. 8 rights and that the evidence gathered through these searches should be excluded under s. 24(2). The trial judge found that the warrantless searches did not constitute a breach of his rights under s. 8 of the *Charter*, and the photos and text message were admissible as the search of the cell phone was incident to Mr. Fearon's arrest. The accused was found guilty of robbery with a firearm and related offences. The Court of Appeal for Ontario (ONCA) unanimously dismissed the accused's appeal. Mr. Fearon appealed to the Supreme Court of Canada (SCC).

Issues

1. Does the exercise of the common law power to search incident to a lawful arrest extend to the search of cell phones and similar devices found on an accused person?
2. If so, under what conditions, if any?
3. If so, were the pictures and text messages collected as evidence against Mr. Fearon admissible in his trial?

Decision

In a split decision, the appeal was dismissed and the evidence against Mr. Fearon was ruled admissible.

Ratio

The common law power to search incident to a lawful arrest permits the search of cell phones and similar devices found on the suspect without a prior warrant. The SCC modified the existing common law framework governing the constitutionality of police searches during arrest to account for the risk of significant invasion of privacy posed by warrantless searches of portable digital communication devices.

Reasons

The Court affirmed that the common law power to search incident to a lawful arrest without a warrant is a powerful and important tool for law enforcement that can allow police to prevent harm to officers, the public and the arrested and prevent the destruction of evidence. Four of the seven SCC judges found that searching a cell phone during an arrest should be allowed without a warrant under certain conditions, in order to meet important law enforcement goals.

Justice Cromwell, on behalf of the majority, sought to define "the point at which the 'public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement." For the majority, the key question was whether the common law power underpinning a cell phone search incident to arrest was reasonable. Historically, the Court has affirmed that reasonable searches within the scope of this power do not violate s. 8 of the *Charter*. To ensure this power does not encroach upon the guarantees in s. 8, the Court held that police officers will be justified in searching a cell phone or similar device incidental to arrest only if:

1. The arrest was lawful;
2. The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:
   - Protecting the police, the accused, or the public;
   - Preserving evidence; or
   - Discovering evidence, including locating additional suspects, in situations in which the investigation would be significantly impeded without the ability to promptly search the cell phone at the time of the arrest;
3. The nature and the extent of the search are tailored to the purpose of the search; and
4. The police take detailed notes of what they have examined on the device and how it was searched.

Applying these conditions to Mr. Fearon's case, the majority found that:

(1) The arrest was lawful, as he had been arrested for robbery;

(2) The search was truly incidental to the arrest, as it was carried out for valid law enforcement reasons such as locating a gun used in the crime, protecting the public and discovering additional suspects or evidence;

(3) The nature and extent of the search was appropriate for these law enforcement goals, because it was a brief search of recent cell phone applications that were open at the time of the search and it was reasonable to believe that information related to the purpose of the arrest might be discovered in this way; but

(4) Police failed to take adequate notes about what they examined and how they conducted the search.

The majority held that the failure to take adequate notes constituted a violation of Mr. Fearon's rights under s. 8. Because it found this infringement, the Court had to determine whether the evidence against Mr. Fearon should be excluded. To do this, it weighed Mr. Fearon's privacy interest in this case against the public interest in having the case decided on its merits. The Court determined that the public's interest was greater than Mr. Fearon's and retained the evidence against him.

Dissenting Opinion

Contrastingly, three dissenting judges found that the most urgent of the law enforcement goals in searching a cell phone without a warrant could already be met by other means. They reasoned that the amount and personal nature of information that can be stored on digital devices means that individuals have an extraordinarily high privacy interest in them, and that warrantless searches should only be permitted under much more urgent conditions than those laid out by the majority.

The three dissenting judges found that the encroachment on privacy posed by the search of cell phones incidental to an arrest is much more dire and violating than the sort of search that is otherwise justified under the common law power. They argued that while generally, law enforcement objectives outweigh the already diminished privacy interest of the accused, there is a quantitative and qualitative difference when the object of the search is a digital device that has a larger data storage capacity. This means that even if police are acting in good faith, there is a significant risk of privacy violations not connected to the valid reasons for the arrest.

Writing for the minority, Justice Karakatsanis found that police should be required to obtain a warrant in all but the most urgent circumstances. As an alternative to the four conditions laid out by the majority, the minority proposed that a warrantless search is permissible only when:

(1) The police have a reasonable belief that searching the device could prevent an imminent threat to safety; or

(2) The police have reasonable grounds to believe that searching the device could prevent the imminent loss or destruction of evidence.

In reaching this conclusion, the minority noted that these powers already exist in the common law and that police still have the option of seizing cell phones without searching them to preserve what evidence they might hold until they can lawfully obtain a warrant to search them.

The minority found that the police did not have reasonable grounds to believe that searching the phone could have prevented imminent harm or the destruction of evidence, and would have excluded the photo and text message evidence against Mr. Fearon.

DISCUSSION

1. How much could a person learn about you if they were able to examine your cell phone? Without being specific, is any of this private?

2. Do people the police suspect of crimes still have a right to privacy?

3. Why do you think there are laws in place that allow police to search suspects without a warrant during the course of an arrest?

4. Refer to the rules the Court set out for determining whether a warrantless search of a cell phone during an arrest has been constitutional. In your own words, what does it mean?

5. Whose framework for determining whether a search is lawful makes more sense to you: that of the majority or that of the minority? Why?

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R v NUR, 2015 SCC 15, [2015] 1 SCR 773.

Date Released: April 14, 2015

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15272/index.do

Facts

A young man entered a community centre in the Jane and Finch neighbourhood of Toronto. That area had high levels of crime and gun violence was a serious concern. The man told a staff member at the centre that he was afraid because there was someone waiting outside to "get him". After the staff member confirmed that someone was outside, a supervisor called the police and put the centre on lockdown.

When the police arrived, they saw four men outside one of the entrances of the centre. The men scattered, and the police chased them. One of the four men, Hussein Nur, was holding his left hand against his body and appeared to be concealing something. As the officer pursuing him drew near, he saw Mr. Nur throw something to the ground moments before he caught and arrested him. When he revisited the site where he saw Mr. Nur throw the object, he discovered a loaded handgun under a parked car.

Mr. Nur was not found to be involved with the aforementioned threatening behaviour, and it was not clear when, for how long, or how he came to possess the loaded handgun. He was charged under s. 95(1) of the *Criminal Code* with possession of a loaded prohibited firearm.

Criminal Code of Canada

95. (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

(*a*) an authorization or a license under which the person may possess the firearm in that place; and

(*b*) the registration certificate for the firearm.

(2) Every person who commits an offence under subsection (1)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

(ii) in the case of a second or subsequent offence, five years; or

Canadian Charter of Rights and Freedoms

s. 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

s. 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

s. 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Procedural History

At trial, the Crown had the option to proceed with the charge against Mr. Nur as a summary or an indictable offence. As a summary offence, the charge carries a maximum sentence of one year, but as an indictable offence it carries a minimum sentence of three years.

The Crown elected to proceed by indictment. Mr. Nur pled guilty, but argued that the three-year minimum sentence violated s. 12 of the *Canadian Charter of Rights and Freedoms*, because it was disproportionate to the offence and therefore a form of cruel and unusual punishment.

The judge held that the three-year mandatory minimum sentence did not offend s. 12 of the *Charter*. However, the judge also ruled that the two-year difference between the sentencing requirements for summary and indictable offences was contrary to s. 7 of the *Charter* because it was arbitrary and was not justified under s. 1.

Nevertheless, the trial judge held that Mr. Nur had not personally been affected by that gap because the Crown would not have proceeded summarily against him in any event. They dismissed the s. 7 claim. Mr. Nur was sentenced to one day in prison because he had already served twenty-six months in custody, which was credited as double time.

Mr. Nur appealed to the Ontario Court of Appeal (ONCA), which allowed the appeal. The ONCA acknowledged mitigating factors, but ultimately upheld the trial judge's decision with respect to Mr. Nur's sentence. That Court also found that the mandatory minimum sentencing regime violated s. 12 of the *Charter*. The Crown appealed to the Supreme Court of Canada (SCC).

Issues

1. Do the mandatory minimum terms of imprisonment in s. 95(2)(a)(i) and (ii) of the *Criminal Code* infringe s. 12 of the *Charter*?
2. Do the mandatory minimum terms of imprisonment in s. 95(2)(a)(i) and (ii) of the *Criminal Code* infringe s. 7 of the *Charter*?
3. If so, can either of these be saved under s. 1 of the *Charter*?

Decision

The SCC declared ss. 95(2)(a)(i) and (ii) of the *Criminal Code* to be of no force or effect as they violated s. 12 of the *Charter*. However, they upheld the sentences imposed by the trial judge, and dismissed the appeals.

Ratio

A law must be *Charter*-compliant in all reasonably foreseeable situations. A mandatory minimum sentence infringes upon the guarantee against "cruel and unusual punishment" in any situation where it is reasonably hypothetical that the law could produce such a punishment.

Reasons

To determine whether a mandatory minimum sentencing provision violates s. 12 of the *Charter*, the majority identified two questions to address. The first is whether the sentence is grossly disproportionate to the specific crime committed by the individual before them. In other words, if the penalty imposed on Mr. Nur was more severe than this crime should warrant, it would be cruel and unusual punishment. The second is whether it could be reasonably foreseeable that applying the law could impose cruel and unusual punishment upon other offenders being sentenced.

Recalling that Mr. Nur was sentenced to a single day in prison in, addition to the time served in custody, he was not arguing that his own sentence was grossly disproportionate at this point. For the SCC, therefore, the question here was whether mandatory minimum terms of imprisonment could be grossly disproportionate when applied to others in different circumstances. The majority found that they could indeed. They presented a hypothetical scenario where a licensed, unloaded gun and ammunition are mistakenly stored in an improper place. In this scenario, the three-year minimum sentence would still apply, but it would be disproportionate to the offence, as there is very little blameworthiness and no real harm or risk to the public arising from the behaviour.

S. 95(2)(a)(i) of the *Criminal Code* can be similarly discounted as being grossly disproportionate for less serious offenders. There are reasonably foreseeable scenarios in which the punishment prescribed is unnecessarily severe compared to the goals of protecting the public, expressing moral condemnation, and deterring similar behaviours in other potential offenders.

Because the majority decided that the provisions of the *Criminal Code* failed under s. 12 in this case, they did not need to determine whether they also failed under s. 7.

The Court applied the *Oakes* test in deciding whether this infringement was justifiable under s. 1, which determines reasonableness through three factors: a law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.

A rational connection between deterrence and mandatory minimum sentences was established, but the law failed on the second and third requirements. The Court held that the law was not minimally impairing, as lawmakers could have written a law that provided less severe sentences for less serious violations of the provision, and that it was not proportionate because its potential negative impact on *Charter* rights outweighs its potential benefit to the public.

Dissenting Opinion

The SCC was not unanimous in this decision. Justice Moldaver, writing on behalf of the dissent, challenged the high threshold set for reasonable foreseeability. He wrote that these scenarios, while technically possible, are highly unlikely to ever actually arise. Further, the minority found that the difference between "true" crimes and the less-serious infractions in the hypothetical scenarios is already addressed by Parliament through the crafting of s. 95 as a hybrid offence – this means that the Crown would always have the option of proceeding summarily with less serious or unintentional offences, but by indictment in more serious cases.

DISCUSSION

1. Why do you think the Crown has the option of proceeding summarily or by indictment in some kinds of criminal charges?

2. Why do you think there are mandatory minimum sentences for some offences? What might be some positive or negative impacts of having them in place?

3. Does three years in prison seem like a fair sentence considering Mr. Nur's offence?

4. The dissenting opinion from the SCC argued that it may have been unnecessary to strike down the law because the Crown always has the option of proceeding summarily against people who commit less serious offences. Might there be any problems with leaving the law as it stands nonetheless?

5. Do you agree with the SCC's finding that s. 95(2)'s negative impacts on *Charter* rights outweigh its benefits for law enforcement and the good of Canadian society? Explain.

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R v KOKOPENACE, 2015 SCC 28, [2015] 2 SCR 398.

Date Released: May 21, 2015

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15373/index.do

Facts

Clifford Kokopenace was an Aboriginal man who lived on the Grassy Narrows First Nation reserve in Kenora, Ontario. He was charged with second degree murder and convicted of manslaughter after a trial by jury. Before he was sentenced, his lawyers learned of problems with the inclusion of on-reserve Aboriginal people as jurors in Kenora. Despite the fact that this group was a significant part of the local population, it made up a very small percentage of those included as potential jurors for trials, and there were no on-reserve Aboriginal Canadians on Mr. Kokopenace's jury. Mr. Kokopenace appealed his conviction, arguing that his right to a fair trial had been violated under ss. 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right.

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment

Procedural History

The Court of Appeal for Ontario (ONCA) held that Mr. Kokopenace had received a fair trial and that the jury that heard his case had not been affected by bias. However, that Court also found that that the state has a duty to try to ensure a representative jury and that the accused's ss.11(d) and 11(f) *Charter* rights had been violated by the lack of efforts to do so. The Court held that this would undermine public confidence in the justice system and that the correct remedy was to order a new trial for Mr. Kokopenace. The Crown appealed to the Supreme Court of Canada (SCC).

Issues

1. What is the government required to do to ensure representativeness of juries in relation to ss. 11 (d) and 11 (f) of the *Charter*?
2. Did the government do enough to meet its obligation to ensure representativeness for the accused?

Decision

The majority of the Supreme Court allowed the appeal. The order for a new trial was set aside and the conviction reinstated.

Chief Justice McLachlin and Justice Cromwell dissented, and found that the appeal should be dismissed.

Ratio

The actual representation of different social groups on a jury is separate from the question of whether the state has taken adequate steps to try to ensure representativeness. As long as the process by which the jury is chosen is a fair one and produces a reasonable cross-section of the community, that jury is representative and the state's duty has been met.

Reasons

The majority considered that the state had met its obligation to ensure representativeness. This was achieved by providing a fair opportunity for a balanced cross-section of a given community to be selected to serve on a jury. To do this, the state must make reasonable efforts to:

1) Compile the list of potential jurors using a random and unbiased selection of residents that are themselves balanced, and
2) Deliver jury notices to all of those people who have been randomly selected without excluding anyone.

Writing for the majority, Justice Moldaver argued that the issue of representativeness is about whether a process is fair, not about whether a particular group is accurately represented on a jury. In other words, the state has a duty to take steps to ensure potential jurors accurately reflect their communities. The state has met that duty if these steps are taken.

The majority reviewed the process by which juries were selected in Kenora and found that reasonable efforts were made to ensure that:

1) The lists of potential jurors were not biased, and
2) That all those who were selected received jury notices.

The Court held that therefore the Crown had met the obligation to ensure the accused's *Charter* right to a representative jury was respected.

In reaching this conclusion, the majority found that on-reserve Aboriginal people were given a reasonable opportunity to be part of the jury pool, but that the response rate among this group was very low. Only about 10% of those who received notices responded, and only about half of these were eligible to serve as jurors. Of 175 potential jurors in Mr. Kokopenace's trial, eight were on-reserve Aboriginals and none of these eight were ultimately selected to hear his case.

The majority stated that there is no precedent in which courts have held that any number of individuals from the same ethnic group as the accused should necessarily compose the jury. Thus, the state has no constitutional obligation to take positive steps to encourage jury participation from any particular group – only to ensure that no group is systematically excluded in the selection process.

Dissenting Opinion

Justice Cromwell and Chief Justice McLachlin interpreted representativeness differently. They reasoned that the role of the jury must be taken into account when analyzing what representativeness means as it pertains to the *Charter*. Specifically, they found that an unbiased and representative jury is the basis of public faith in the justice system. For this reason, the focus should not be simply on the process by which jury pools are compiled, but also on whether the state actually succeeds in achieving representativeness. More simply, public perceptions of the justice system might suffer if the processes by which juries are generated do not result in representative juries.

In its analysis, the minority called attention to the historically difficult relationship between Aboriginal people in Canada and the law. They noted that Aboriginal people are grossly over-represented in Canadian jails and prisons, and that their under-representation on juries has been one of the contributing factors in this imbalance. They concluded, in contrast to the majority, that the state does have a positive obligation to encourage representative jury participation because of the estrangement of Aboriginals from the Canadian justice system. By failing to make greater efforts to do so, the Province of Ontario had, in fact, infringed upon Mr. Kokopenace's constitutional right to a fair trial. The minority would have upheld the ONCA's decision to award him a new trial.

DISCUSSION

1. Do you think that you would like to serve on a jury? Why or why not?

2. Why is it important for a jury to reflect the characteristics of a community?

3. How might the under-representation of Aboriginal people on juries contribute to the relatively high rates of Aboriginal people in prisons?

4. What matters more: whether a sincere effort has been made to include specific groups on a jury or whether, in the end, the jury includes representatives of those groups?

5. What could the government do to make people more likely to respond when called for jury duty?

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CARTER v CANADA (ATTORNEY GENERAL), 2015 SCC 5, [2015] 1 SCR 331.

Date Released: February 6, 2015

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do

Facts

Prior to this case, aiding or abetting a person to commit suicide was a criminal offence, which meant that a person could not seek a physician-assisted death. In 1993, the Supreme Court of Canada (SCC) upheld this blanket *Criminal Code* prohibition on assisted suicide by a slim majority in *Rodriguez v British Columbia (AG)*.

In 2009, Gloria Taylor was diagnosed with a fatal neurodegenerative disease called amyotrophic lateral sclerosis (ALS). Taylor did not want to "live in a bedridden state, stripped of dignity and independence." As a result, Taylor challenged the constitutionality of *Criminal Code* provisions ss. 14 and 241(b), which prohibited assistance in dying. Lee Carter and Hollis Johnson, who had previously taken Carter's mother to an assisted suicide clinic in Switzerland to fulfill her wish to die with dignity, joined the challenge, along with a physician, and the British Columbia Civil Liberties Association. They argued that the *Criminal Code* provisions violated the rights set out in sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

Criminal Code of Canada

14. No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

24(1). Every one who

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[1] *Carter v Canada (Attorney General)*, 2015 SCC 5, at 12.

Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Procedural History

At trial, the judge found that the *Criminal Code* provisions violated the s. 7 *Charter* rights of competent adults who were suffering intolerably as a result of an irremediable medical condition. She granted a one-year suspension of invalidity and provided Taylor with a constitutional exemption. On appeal, the majority for the British Columbia Court of Appeal (BCCA) followed the precedent set out in *Rodriguez v British Columbia (AG)* [1993], which upheld the prohibition on assisted suicide, and overturned the trial judge's ruling. The applicants appealed to the SCC.

Issues

1. Do ss. 14 and 241(b) of the *Criminal Code*, which prohibit physician-assisted dying, infringe upon the right to life, liberty, and security of the person, as guaranteed under s. 7 of the *Charter*?
2. Do ss. 14 and 241(b) infringe upon the applicant's guarantee to equal treatment provided under s. 15 of the *Charter*?

Decision

The SCC unanimously struck down the *Criminal Code* prohibition on assisted suicide, holding that ss. 14 and 241(b) of the *Criminal Code* were overbroad, and therefore contrary to s. 7 of the *Charter,* in a way that cannot be justified by s. 1. Since the prohibition violated s. 7 of the *Charter*, it was unnecessary to consider violations under s. 15.

Ratio

The *Criminal Code* provisions on assisted suicide deprived Taylor and others suffering from irremediable medical conditions of the right to life, liberty and security of the person in a manner that was overbroad, and therefore not in accordance with the principles of fundamental justice, in violation of s. 7 of the *Charter*.

The prohibition against physician-assisted dying was void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individuals in the circumstances of their condition.

Reasons

The *Criminal Code* provisions on assisted suicide had the effect of forcing some individuals to take their own lives prematurely for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. Thus, the prohibition deprived some individuals of life.

While the *Criminal Code* provisions denied some individuals the right to request a physician's assistance in dying, the law allowed others in similar situations to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment. This interfered with a person's ability to make decisions concerning their bodily integrity and medical care, infringing upon liberty.

Finally, by leaving people like Taylor to endure intolerable suffering, the *Criminal Code* provisions impinged on their security of the person.

A law that impinges on life, liberty or security of the person must not be overbroad. Here, the law was overbroad because it cast a wide net. The object of the law was to protect vulnerable persons from being induced to commit suicide at a moment of weakness. For example, some advocates for people with disabilities argued that this change in the law could lead many people with disabilities to end their lives prematurely and that social discrimination against disabled people was an important factor in this. From this view, changing the law to essentially make assisted dying available to people with medical disabilities advances an already prevalent notion that the lives of people with disabilities are less worth living than those of people without disabilities.

For the SCC, though, the prohibition also caught people outside this class. For example, Taylor was competent, fully-informed and free from coercion or duress; she was clearly outside the intended audience. Thus, it followed that the limitation on *Charter* rights was, in at least some cases, not connected with the objective of protecting vulnerable persons. This type of blanket criminal prohibition captured conduct unrelated to the law's objective – Taylor and others in her situation were not in need of the law's protection, in this sense.

The SCC struck down the prohibition against physician-assisted dying in February 2015, and gave governments twelve months to draft legislation reflecting the change in the law. In January 2016, this deadline was extended by four additional months because only Ontario and Quebec had provincial guidelines in place and the federal government had not yet completed drafting the new law. The new deadline was June 6, 2016.

The federal government did not meet the SCC's deadline, but new legislation received royal assent on June 17, 2016. Despite the government's efforts to comply with the ruling in *Carter*, a *Charter* challenge to the new legislation was launched just days after the law came into force.

DISCUSSION

1. Prior to this ruling, what options might a person have had for ending their own life when faced with a condition that was intolerable to them?

2. Why might a physician-assisted death be preferable to other ways of ending one's life for someone contemplating that decision?

3. In its ruling, the SCC clarified that the law was changed for fully competent adults who have clearly consented to terminating their lives and who have a serious and irreversible medical condition, including an illness, disability or disease that is intolerable to the individual. How might the perspective of people with serious mental health conditions complicate this?

4. Should only people with serious and irremediable illness have the right to a physician-assisted death, or should this right be extended to a broader group? Why?

5. Taking all of these factors into account, do you feel that the SCC came to the correct decision? Explain.

